

**Pursuant to Ind.Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.**

ATTORNEYS FOR APPELLANTS:

**BRUCE MUNSON**

Muncie, Indiana

**DAVID TAYLOR**

Edwardsburg, Michigan

*Pro Hac Vice*

**DAVID A. AXELROD**

**ROBERT A. COHEN**

David A. Axelrod & Associates, P.C.

Chicago, Illinois

ATTORNEYS FOR APPELLEES:

**LEE B. McTURNAN**

**STEVEN M. BADGER**

**SHANNON D. LANDRETH**

McTurnan & Turner

Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

MARY A. SPROULL, SURENDRA GUPTA, )  
AURORA DeCASTRO, MICHAEL BERG, )  
PETER M. ZACKER, SANDRA HAMEL, )  
VICTORIA WISE, JAMES WISE, STEVE )  
GOENS, HAMEL & ELBERT PARTNERSHIP, )  
DELAWARE CHARTER GUARANTEE & )  
TRUST, as Trustee of the Frank D. Harrison IRA, )  
SHASHI P. GUPTA, ARUN K. AGARWAL, )  
JANET RESNICK, MICHAEL HOLLENDONER, )  
CHARLES F. MEIER, MARILYN MEIER, )  
ROBERT W. MOHS, DAIN RAUSCHER, as )  
Custodian for the Robert W. Mohs IRA, PIPER )  
JAFFRAY, as Custodian for Anton H. Clemens, )  
VERNON R. SAILOR, EDWARD P. WELTER, )  
JILL SOENS, CAREN GAY, WALTER E. )  
WELLS, HAMENDER K. AGARWAL, ENRIQUE )  
LEVY, SHARRON PUTNAM, KELLY ROSE, )  
PRUDENTIAL SECURITIES, as Custodian for the )  
Gerald D. Putnam IRA, GERALD D. PUTMAN, )  
M. BARBARA HOFFMAN, J. TUCKER )

MARSTON, SUSAN C. MARSTON, CONSTANCE )  
M. NOVELLO, MARY ANN BURGER-EASH, )  
WILHELMINIA WELTER, GLEN RIEGSECKER, )  
ARVIND BHARGAVA, MAC CLUB, and )  
MARK L. PRIEBE, )

Appellants-Plaintiffs, )

vs. )

NELSON J. VOGEL, JR., MARTHA B. MOO, )  
and BARNES & THORNBURG, )

Appellees-Defendants. )

No. 46A04-0506-CV-360

---

APPEAL FROM THE LAPORTE CIRCUIT COURT  
The Honorable Robert W. Gilmore, Jr., Judge  
Cause No. 46C01-0404-PL-100

---

**October 5, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

**Case Summary**

Mary A. Sproull, Surendra Gupta, Aurora DeCastro, Michael Berg, Peter M. Zacker, Sandra Hamel, Victoria Wise, James Wise, Steve Goens, Hamel & Elbert Partnership, Delaware Charter Guarantee & Trust, as Trustee of the Frank D. Harrison IRA, Shashi P. Gupta, Arun K. Agarwal, Janet Resnick, Michael Hollendonner, Charles F. Meier, Marilyn Meier, Robert W. Mohs, Dain Rauscher, as Custodian for the Robert W. Mohs IRA, Piper Jaffray, as Custodian for Anton H. Clemens, Vernon R. Sailor, Edward P. Welter, Jill Soens, Caren Gay, Walter E. Wells, Hamender K. Agarwal, Enrique Levy, Sharron Putnam, Kelly

Rose, Prudential Securities, as Custodian for the Gerald D. Putnam IRA, Gerald D. Putnam, M. Barbara Hoffman, J. Tucker Marston, Susan C. Marston, Constance M. Novello, Mary Ann Burger-Eash, Wilhelminia Welter, Glen Riegsecker, Arvind Bhargava, Mac Club and Mark L. Priebe, shareholders of GDS Technology, Inc. (“GDS”), (collectively, “the Shareholders”) brought a legal malpractice complaint against Nelson J. Vogel, Jr. (“Vogel”), Martha B. Moo (“Moo”), and Barnes & Thornburg (collectively, “Barnes & Thornburg”) and the trial court granted partial summary judgment against those Shareholders who were not GDS Directors (hereinafter, “Non-Director Shareholders”). The Non-Director Shareholders now appeal.<sup>1</sup> We affirm.

### **Issue**

The Non-Director Shareholders present three issues, which we consolidate and restate as one: Whether the trial court erroneously granted partial summary judgment to Barnes & Thornburg upon finding it had no duty to the Non-Director Shareholders, because there exist genuine issues of material fact regarding whether:

- (a) Barnes & Thornburg assumed a contractual duty to the Non-Director Shareholders as third-party beneficiaries; and
- (b) Barnes & Thornburg assumed a duty to the Non-Director Shareholders pursuant to the Restatement (Third) of Law Governing Lawyers.

### **Facts and Procedural History**

The relevant facts are not in dispute. GDS, an Indiana corporation, was engaged in the development of medical diagnostic test systems. In 1994, GDS hired Barnes &

---

<sup>1</sup> Shareholders Dr. Surendra Gupta, Dr. Aurora DeCastro, Mary Sproull, Enrique Levy and Sandra Hamel were also Directors of GDS; summary judgment was not granted against these plaintiffs. They are not

Thornburg as corporate counsel. During November of 1996, GDS involved Barnes & Thornburg in the negotiations of a potential stock purchase by Sabratek Corporation (“Sabratek”).

On December 16, 1996, Vogel sent a letter to GDS and Sabratek, outlining the terms of the representation agreement and specifying that Barnes & Thornburg would perform services for GDS. On May 5, 1997, the Shareholders received a Shareholder Information Packet partially prepared by Barnes & Thornburg, containing a Stock Option Agreement, Registration Rights Agreement and Exclusive Supply and Distribution Agreement. The Shareholder Information Packet directed the Shareholders to forward questions or requests for information to GDS in care of Director Surendra Gupta. The Shareholders were also advised to make individual inquiries and consult individual advisors as to legal and tax consequences. Signed Stock Option Agreements were to be returned to GDS.

The Distribution Agreement provided that Sabratek would pay \$4,000,000.00 to gain the rights to be the exclusive distributor of some of GDS’s products worldwide. The Stock Option Agreement provided for two alternatives for the potential sale of GDS stock to Sabratek. Sabratek would have a Call Option, an option for approximately two years to buy all of the GDS common stock held by GDS shareholders. If the Call Option was not exercised within the specified time, the Put Option was available. Under the Put Option, Sabratek would buy the GDS common stock held by GDS shareholders, exercisable at the election of 75% of the Shareholders, within 30 days of the expiration of the Call Option. The purchase price of the stock was to be, at a minimum, \$5,000,000.00.

The purchase price was payable to the Shareholders either in cash or unregistered Sabratek stock, at Sabratek's discretion. However, if Sabratek chose to purchase the shares with unregistered stock, it was required to register that stock within sixty days of issuance. If Sabratek failed to timely register the stock, the Shareholders were immediately due the cash value of the stock. The Registration Rights Agreement required that Sabratek petition the Securities and Exchange Commission to allow each of the Shareholders to sell any Sabratek shares received in the event that Sabratek was allowed to pay for the GDS shares with Sabratek common stock.

Several of the Shareholders withheld consent to the proposed transaction, pending resolution of an issue regarding a share dilution claim asserted against GDS. Barnes & Thornburg represented GDS in negotiations with these shareholders and their counsel. Ultimately, there was 100% approval of the GDS-Sabratek transaction by the remaining GDS shareholders.

Sabratek exercised the Call Option, and on July 9, 1999, Sabratek acquired all of the outstanding shares of GDS. In exchange, the Shareholders received unregistered shares of Sabratek common stock. Sabratek did not register the stock within 60 days of closing as it was obligated to do under the Option Agreement. Approximately five months after the closing, Mary Sproull made a formal demand upon Sabratek for \$551,795.04. On the same day, Sabratek filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. The Shareholders were unable to sell their stock or to pursue a preferential claim in the bankruptcy court.

On August 2, 2000, the Shareholders filed a complaint in the St. Joseph Superior Court, alleging that Barnes & Thornburg had a duty to protect the interests of the Shareholders and breached that duty. In particular, the Shareholders alleged that a competent attorney would not have agreed to a two-year stock purchase option without an escrow or lien agreement. Further, the complaint alleged that Barnes & Thornburg failed to adequately investigate Sabratek's representations and warranties after a lawsuit was filed on January 27, 1999 by Sabratek shareholders, alleging that officers and directors of Sabratek violated Federal Securities laws by falsifying Sabratek financial reports. The Shareholders alleged that they were "the intended beneficiaries of the services of the Defendants." (App. 161.)

On April 30, 2003, Barnes & Thornburg moved for partial summary judgment against the Non-Director Shareholders. On April 13, 2004, the trial court conducted a hearing on the motion for partial summary judgment. On July 6, 2004, the trial court granted the motion for partial summary judgment on grounds that Barnes & Thornburg agreed to represent the corporate entity GDS and did not also owe a duty to the Non-Director Shareholders. On August 4, 2004, Barnes & Thornburg requested that the trial court enter the summary judgment ruling as a final judgment under Indiana Trial Rule 54(B). On August 10, 2004, the trial court granted the motion.

On September 9, 2004, the Non-Director Shareholders filed their "Motion to Vacate August 10, 2004 Order Certifying July 6, 2004 Order for Immediate Appeal and to Reconsider July 6, 2004 Order." App. 1249. On the same day, the trial court entered an order vacating its order of August 10, 2004. On December 1, 2004, the trial court conducted a hearing on the motion to reconsider. On March 10, 2005, the trial court entered an order

denying the Non-Director Shareholders' motion to reconsider, and setting a hearing on Barnes & Thornburg's pending Trial Rule 54(B) motion. On June 7, 2005, following a telephonic hearing, the trial court ordered that the partial summary judgment ruling be entered as a final judgment. On June 24, 2005, the Non-Director Shareholders filed their Notice of Appeal.

On December 14, 2005, this Court issued a Show Cause Order, directing the Non-Director Shareholders to show cause why the appeal should not be dismissed for untimely filing of the Notice of Appeal. On January 13, 2006, the Non-Director Shareholders filed a Response. On January 27, 2006, Barnes & Thornburg filed a Response. On February 23, 2006, this Court entered an order discharging its Show Cause Order and directing the parties to proceed with the appeal.<sup>2</sup>

## **Discussion and Decision**

### **A. Standard of Review**

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Our standard of review is the same as the trial court's when reviewing a grant of summary judgment. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). We consider only those facts that the parties designated to the trial court. Id. The Court must accept as true those facts alleged by the nonmoving party,

---

<sup>2</sup> We may reconsider a ruling by the motions panel but will decline to do so absent clear authority establishing that it erred as a matter of law. State v. Sagalovsky, 836 N.E.2d 260, 264 (Ind. Ct. App. 2005), trans. denied. Here, we do not reconsider the determination of the motions panel that the Non-Director Shareholders had shown sufficient cause and should be allowed to proceed with their appeal.

construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Id. A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied. Questions of law are reviewed de novo. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000). We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. Payton v. Hadley, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004).

The complaint alleged that Barnes & Thornburg attorneys were negligent in the performance of their professional duties. The elements of attorney malpractice are: (1) employment of an attorney which creates the duty; (2) the failure of the attorney to exercise ordinary skill and knowledge (the breach of the duty); and (3) that such negligence was the proximate cause (4) of damage to the plaintiff. Rice v. Strunk, 670 N.E.2d 1280, 1283-84 (Ind. 1996).

#### B. Alleged Duty to Third-Party Beneficiary

The Non-Director Shareholders initially dispute the trial court's finding, as a matter of law, that Barnes & Thornburg did not owe a duty to them as third-party beneficiaries of the retention agreement between GDS and Barnes & Thornburg. Specifically, the Non-Director Shareholders claim that "[t]here was no purpose to GDS' retention of Appellees other than to serve the interests of the shareholders." Appellant's Br. at 12.

Those not a party to a contract may enforce the contract despite a lack of privity if they demonstrate that they are third-party beneficiaries. Luhnnow v. Horn, 760 N.E.2d 621,



628 (Ind. Ct. App. 2001). A third-party beneficiary is not merely one who derives an incidental benefit from the performance of the promisor, but rather must show: (1) a clear intent by the actual parties to the contract to benefit the third party; (2) a duty imposed on one of the contracting parties in favor of the third party; and (3) performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract. Id. The intent to benefit the third party is the controlling factor and may be shown by specifically naming the third party or by other evidence. Id. In some circumstances, a non-client may be a third-party beneficiary to a contract for legal services. Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988).

The Non-Director Shareholders have identified no legal precedent, in Indiana or in other jurisdictions, finding shareholders to be third-party beneficiaries of a contract for legal services entered into by a corporation and the corporation's attorneys. However, the Non-Director Shareholders assert that they are similarly situated to intended beneficiaries of a will. They rely upon the Walker decision, and also direct our attention to Hermann v. Frey, 537 N.E.2d 529 (Ind. Ct. App. 1989).

In Walker, the Indiana Supreme Court held that the breach of an attorney in drafting a will for his client could give rise to a claim by a known beneficiary who suffers an injury as a consequence of that breach. 526 N.E.2d at 968. The attorney drafted a will for his client, thereby making the client's children from her first marriage the sole beneficiaries of her estate, and excluding her second childless spouse. Id. at 968-69. The Court noted that the explicit purpose of the attorney/client meeting was to deprive the spouse of an estate interest and to benefit the client's children. See id. However, after the client's death, the spouse

elected to take a statutory interest in the estate, giving rise to a malpractice claim against the attorney by one of the children. See id. Because the child was a known beneficiary under the will, he could file a complaint sounding in negligence against the attorney. See id.

In Hermann, a separate panel of this Court held that an attorney could be subject to a professional malpractice action by a known third party beneficiary who was not his client. 537 N.E.2d at 531. Carol Hermann retained attorney Eric Frey to represent the estate of her late husband for the purpose of bringing a medical malpractice action against a hospital and two physicians. Id. at 530. Frey failed to name one physician as a defendant in the medical malpractice action, and Carol thereafter filed a malpractice action against Frey, in her own name and not as administratrix of the estate. See id. Frey was granted summary judgment on grounds that the estate, and not Carol, was the client. See id. However, on appeal, this Court held that Carol met the qualifications for a known third party because: “(1) she was her late husband’s only surviving heir at law; (2) she had retained Frey to represent her husband’s estate, and (3) was entitled to his professional advice and counsel while prosecuting the estate’s medical malpractice action as its administratrix.” Id. at 531.

Here, however, the designated materials reveal that the Non-Director Shareholders failed to meet the criteria for establishing third-party beneficiary status. They did not retain Barnes & Thornburg and were not entitled to their professional advice and counsel during the transaction with Sabratek. Indeed, the Shareholders were told to obtain other advisors. There is no designated evidence to establish that any of the non-Director Shareholders did, in fact, contact Barnes & Thornburg to seek advice regarding the proposed GDS/Sabratek

transaction.<sup>3</sup> Finally, the contract between GDS and Barnes & Thornburg does not specifically name individual shareholders and does not show a clear intent to directly benefit them. The retention contract concerns the rights and obligations of the two contracting parties, GDS, a corporate entity, and Barnes & Thornburg, the attorneys for the corporation.

The trial court properly concluded that the Non-Director Shareholders were not third-party beneficiaries of the contract for legal services between GDS and Barnes & Thornburg.

### C. Alleged Duty under the Restatement of Law Governing Lawyers

The Non-Director Shareholders next urge our express adoption and application of the Restatement (Third) of Law Governing Lawyers § 51(2)-(3), which they deem applicable to Barnes & Thornburg, providing that an attorney owes a duty of care to:

a nonclient when and to the extent that: (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; . . .

a nonclient when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

The Indiana Supreme Court has not expressly adopted these provisions, and the Non-Director Shareholders did not specifically argue for their adoption at the summary judgment hearing.

---

<sup>3</sup> One shareholder, an administrative assistant to one of the GDS Directors, had limited contact with Barnes & Thornburg in the course of performing her administrative duties. However, there is no evidence of record that she sought or obtained counsel from Barnes & Thornburg.

However, the Non-Director Shareholders presented a similar argument to the trial court, i.e., that the duty attendant to an attorney/client relationship should be implied under established Indiana common law. The trial court specifically refused to recognize an implied duty, citing an absence of designated evidence of conduct inviting reliance on the part of Barnes & Thornburg or of detrimental reliance on the part of the Non-Director Shareholders.

Ordinarily, whether the law recognizes any duty on the part of a particular defendant to conform the defendant's conduct to a certain standard for the benefit of the plaintiff requires that three factors be balanced: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). An attorney-client relationship can arise when a lawyer affirmatively assumes a duty of representation, and there is evidence of reliance upon the attorney's advice or an expectation of personal representation. Rice, 670 N.E.2d at 1280. In other words, a fiduciary duty to one who is technically a nonclient may arise when an attorney's conduct invites reliance and the individual given information so relies.

Nevertheless, we agree with the trial court that the designated record reveals no evidence that Barnes & Thornburg assumed the representation of any Non-Director Shareholder or invited their reliance. The Non-Director Shareholders could not reasonably have expected legal representation by Barnes & Thornburg, in light of the directive to obtain other advisors, and the absence of communication between Barnes & Thornburg and the individual Non-Director Shareholders. Moreover, even if we were inclined to specifically adopt each provision of the Restatement (Third) of Law Governing Lawyers § 51, the

designated record does not suggest that GDS retained Barnes & Thornburg under such circumstances that a benefit to the Non-Director Shareholders was a known primary objective of the legal representation.

Accordingly, the trial court properly concluded, as a matter of law, that Barnes & Thornburg did not assume a fiduciary duty to the Non-Director Shareholders.

### **Conclusion**

Barnes & Thornburg negated an element of the Non-Director Shareholders' legal malpractice claim, more specifically, the element of duty. As there exists no genuine issue of material fact and Barnes & Thornburg is entitled to judgment as a matter of law, the trial court properly granted partial summary judgment against the Non-Director Shareholders.

Affirmed.

RILEY, J., and MAY, J., concur.